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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1938.

No. 22

UNITED STATES OF AMERICA,
*Petitioner,*
*vs.*

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## ANSWER TO PETITIONER'S MOTION TO JOIN NEW PARTY DEFENDANT.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

IN THE

# Supreme Court of the United States

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## ANSWER TO PETITIONER'S MOTION TO JOIN NEW PARTY DEFENDANT.

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Comes now Continental Illinois National Bank and Trust Company of Chicago, a national banking association with its principal offices at Chicago, Illinois, appearing specially and not generally, and prays that the "Motion to Join New Party Defendant" filed by petitioner herein seeking to join as a party defendant in this proceeding the "Continental Illinois National Bank & Trust Company of Chicago, a national banking corporation with offi-

ces at Chicago, Illinois, as trustee under the power of appointment exercised by Henry Duggan, deceased, by his last will and testament, over property previously held in trust by Continental National Bank & Trust Company of Chicago in trust under the will of James Duggan, deceased," and to continue this action against the Continental Illinois National Bank and Trust Company of Chicago in such capacity, be denied for the following reasons:

There is no procedure by which a new transferee proceeding may be instituted against this bank in an appellate court.

If there were a right to bring this bank into this proceeding at any time it should have been done in a lower court, and, in any event, the time has passed for joining it as a party in this court.

A transferee proceeding in equity cannot be maintained against this bank as trustee under a trust created by the will of Henry Duggan without also joining the beneficiaries of such trust.

CONTINENTAL ILLINOIS NATIONAL BANK, AND TRUST COMPANY OF CHICAGO,
By CARL MEYER,
*Its Attorney-in-Fact.*

IN THE

# Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## BRIEF IN SUPPORT OF ANSWER TO PETITIONER'S MOTION TO JOIN NEW PARTY DEFENDANT.

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1. This bank is a trustee of a trust created by the will of Henry Duggan, deceased, for the benefit of certain beneficiaries whose rights and interests in the trust property arose immediately upon the death of Henry Duggan. Those interests did not await the physical delivery or transfer of the property in question from the Continental National Bank and Trust Company of Chicago (hereafter called "Continental National") to this bank as such trustee. They arose at once by operation of law upon the death of Henry

Duggan. The Continental National, upon such death, ceased to be a trustee under the will of James Duggan, and became merely the custodian of the property in question for this bank as trustee and for the beneficiaries under the new trust created by the will of Henry Duggan. The rights and interests of such beneficiaries cannot be determined in any proceeding in which they are not parties, and there is no method by which this bank as trustee or the beneficiaries under this trust can properly be made parties to any pending proceeding in this court.

The case of *Greenleaf* v. *Queen*, 1 Pet. 138, 148, referred to in the Government's motion, makes it clear that the Government's claim to collect a tax from this trustee and the beneficiaries under the Henry Duggan trust could be maintained only by a new proceeding, by supplemental bill or otherwise, in the District Court. There is no process of substitution in an appellate proceeding which can remedy a defect of this kind. Certainly a new tax case against new transferees cannot be instituted in an appellate court by means of a substitution of parties after the statutory time for the commencement of such a proceeding has expired.

While there are various federal statutes providing for the substitution of parties (see 28 U. S. C. A., secs. 778, 779 and 780) there is no statute that covers the case of the termination by operation of law of one trust and the creation of an entirely new trust with a different trustee and different beneficiaries, nor is the situation similar to the mere transfer of an interest *pendente lite*. The Continental National, through no action of its own, has ceased to be a trustee and the trust under which it operated has terminated. The new trustee is not a successor but is trustee of an entirely new trust. Yet it had a right to all of the property from the moment of Henry Duggan's death and it alone can account for the property.

Under these circumstances a new action or a supplemental

bill in the nature of a new transferee proceeding in the trial court (if the action were pending there) would be the only methods of procedure open to the Government and it would be improper now to join the Continental Illinois National Bank and Trust Company of Chicago (hereafter called "Continental Illinois"), as trustee under the will of Henry Duggan, as a party defendant and to continue this writ of certiorari against it. *Cf. Chester* v. *Life Ass'n. of America*, 4 Fed. 487.

2. Henry Duggan died on October 16, 1937. The right of this bank to become trustee under his will and to receive the trust property arose at that time, and the physical transfer or conveyance of the property from the Continental National was not necessary to the creation of the trust. The time of such transfer was immaterial. That bank, as already stated, had ceased to be a trustee under the will of James Duggan and, after Henry Duggan's death, held the property as custodian for this bank as trustee and for the beneficiaries under the new trust created by the will of Henry Duggan. That this trust was created by the exercise of a power of appointment is immaterial and does not alter the fact that on Henry Duggan's death a new trust came into existence with new beneficiaries and a new trustee.

In many states testamentary trustees are required by statutes to file periodical and final accounts (see Bogert, Trusts and Trustees, Vol. 4, sec. 965, *et seq.*). This is not true in Illinois. In Illinois the Probate Court has no jurisdiction over trusts and there is no statute or court rule relating to accounting by trustees (see Bogert, Trusts and Trustees, Vol. 4, sec. 965). In the case of *Warner* v. *Mettler*, 260 Ill. 416, 103 N. E. 259, an account filed by a testamentary trustee was ordered stricken from the files of the lower court on the ground that there was no jurisdiction in equity to pass upon and approve the report of a testa-

mentary trustee, since "the report presented no reason a court of equity to assume jurisdiction in this matter.'

The trustee capacity of Continental National there automatically ceased, by the terms of the will of Ja Duggan, which created the trust, on October 16, 1937, the trustee capacity of Continental Illinois, as trustee der the will of Henry Duggan, began at the same ti Under the will of James Duggan it was the duty of trustee of the expired trust to turn over the property th in to the trustee of the new trust as soon as possible a Henry Duggan's death, and the laws of Illinois do not p vide for the filing of a final account or for any court p ceeding or order in connection therewith.

At that time this proceeding was pending in the Cir Court of Appeals for the Seventh Circuit. While the tion was still there counsel for the Government were vised of the death of Henry Duggan (see affidavit in s port of motion to dismiss certiorari, page 5). Counsel m then have known of the termination of the trust un which Continental National was trustee, as the will James Duggan provided that it should terminate upon death of Henry Duggan. The record does not discl whether or not counsel knew of the creation of the n trust, but, if not, it would have been a simple matter to quire as to the disposition made of the trust property Henry Duggan, or to examine his will on file in the P bate Court of Cook County, Illinois.

However, it was not until after the issuance of the m date from the Circuit Court of Appeals that any act was taken, and then application to bring in a new pa was not made to the District Court (which had jurisd tion at that time) but to the Circuit Court of Appeals wh had lost jurisdiction, and application was made only substitute the executor of Henry Duggan (although party named as executor in the application was not

ecutor) and not to bring in this bank as trustee under the will of Henry Duggan.

By reason of the Government's laches it is now too late to make the substitutions or additions which the Government desires even if they could be made in a court of review. In those situations where a suit may be revived against a successor in interest it has uniformly been the ruling of this court and the lower federal courts that the substitution must be made in the court having jurisdiction at the time of the transfer of the interest. In *Taylor, et al.* v. *Savage,* 1 How. 282, an appeal was held irregular because an administrator had not been substituted below. In *McClane* v. *Boon,* 6 Wall. 244, it was held that "application should have been made to the court below for the purpose of reviving the suit in the name of the widow and heirs of the deceased; and then a writ of error could have regularly issued."

This court in the case of *Florida* v. *Croom,* 226 U. S. 309, dismissed a writ of error because of the failure of the plaintiff in error to substitute a successor state official before suing out the writ of error. In *Davis* v. *Preston,* 280 U. S. 406, it was held that a writ of certiorari "was improvidently allowed and must be dismissed" due to the failure to substitute a successor federal officer in the court to which the writ was directed. See also *Barribeau, et al.* v. *Brant,* 17 How. 43, and *Sharon* v. *Terry,* 36 Fed. 337, 364.

Not only did the Government fail to make the necessary substitution below in the present case but it has also delayed too long to make the substitution in this court even if this court had jurisdiction over that matter. Rule 19 of this court pertaining to the substitution of the representative of a deceased person (which is one of the few situations where there may be a substitution in an appellate court) requires that the substitution be made by the second day of the term next succeeding the suggestion of

death. That day was October 4, 1938, but no applicat was made to bring the Continental Illinois into this c in any capacity until after that date. Indeed, this ba has not, up to the present time, been served with any n tice of any application to bring it into this case as exe tor under the will of Henry Duggan. As this court stat in *Dolan* v. *Jennings*, 139 U. S. 385, 387, "the proper cou of proceeding upon this subject has been wholly dis garded."

Counsel for the Government refer to Rule 25 (c) of t Federal Rules of Civil Procedure which relates to subs tution of parties and continuance of an action against original party where there has been a transfer of intere Rule 1 limits the application of the Federal Rules of Ci Procedure to proceedings "in the District courts of t United States" and there can be no question but th Rule 25 (c) has no effect upon appellate procedure. S Moore's Federal Practice under the new Federal Rul Vol. 2, p. 2426. It is also doubtful that Rule 25 (c) w intended to cover the situation presented here even if had occurred in the District Court as there is not a tra fer of interest but the termination by operation of law one interest and the creation of others, and any right t Government may have against Continental Illinois und the will of Henry Duggan is a new cause of action whi should be prosecuted through a new transferee proceedi

3. It is the special duty of a court of equity to prot the beneficiaries of a trust. No court of equity is auth ized to ignore their existence or their rights. The Gover ment recognized this when it filed the original bill in t case. It made the beneficiaries of the trusts under Jam Duggan's will defendants in the cause. Since then, a long before this court was asked to intervene, a new tr with new beneficiaries came into existence. We submit t this is not the proper tribunal in which to bring a new

supplemental proceeding against the trustee in that trust, and that, in any event, the beneficiaries of that trust are necessary parties to any proceeding that may be instituted in any court.

The Illinois rule as to this is stated in *Peoples Bank and Trust Co.* v. *Gregory*, 347 Ill. 397, 179 N. E. 856, as follows (p. 398):

> "* * * The general rule is that in all suits respecting trust property, whether brought by or against a trustee, the beneficiaries are necessary parties, and the objection on account of their not being made parties may be taken on appeal. The trustee is a necessary party because he holds the legal title. The beneficiary is a necessary party because he has the equitable and ultimate interest to be affected by the decree. (*Ambos* v. *Glos*, 314 Ill. 438; *Rodman* v. *Quick*, 211 id. 546; *Wilson* v. *Central Trust Co.*, 285 id. 427; *Dubs* v. *Egli*, 167 id. 514.)"

See also *Carey, et al.* v. *Brown*, 92 U. S. 171, 172, and Perry on Trusts, secs. 873 and 874.

As to this requirement, we are not dealing with matters of procedure which may be governed by rules of court or rules of procedure. We are dealing with substantive rights and the time within which, under the revenue acts, such rights may be brought in question.

Since no application has been made to bring into this proceeding the beneficiaries of the trust created by the will of Henry Duggan, deceased, and for the other reasons presented in the answer of this bank and in this brief, it is submitted that the motion for the addition of this trustee as a party defendant should be denied.

Respectfully submitted,

Continental Illinois National Bank
and Trust Company of Chicago,
By Carl Meyer,
*Its Attorney-in-Fact.*

October 22, 1938.

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# SUPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1938.

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| United States, Petitioner, *vs.* Continental National Bank and Trust Company, Trustee under the last will and testament of James Duggan, Deceased, et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. |

[January 3, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

May 6, 1932, petitioner sued respondents in the federal court for the northern district of Illinois to enforce a claim for part of income and profits taxes for 1920 assessed against an Illinois corporation dissolved in December, 1921. The question for decision is whether the suit is barred by lapse of time.

The pertinent substance of the complaint, as amended February 14, 1937, follows:

In 1919 and 1920, James Duggan, hereafter called the testator, was the principal stockholder of the Johnson City & Big Muddy Coal & Mining Company, which owned a subsidiary corporation. May 16, 1921, these corporations made consolidated income and profits tax returns for 1920, showing a tax of $5,269.21, which was paid. During 1920 and 1921 the mining company was being dissolved; it converted its assets into cash and securities and transferred $295,331.64 to testator; he appropriated it to his own use. Having determined deficiency of $316,620.61 against the company, the commissioner of internal revenue December 6, 1924 sent notice to it by 60-day letter. The taxpayer having failed to petition the board of tax appeals for redetermination, assessment was made against it for that amount.

April 15, 1926, the commissioner notified testator that there was proposed for assessment against him the amount of $295,331.64, constituting his liability, as transferee of taxpayer's assets, on account of the unpaid balance of its 1920 taxes. June 11, 1926, testator

filed with the board of tax appeals his petition for redetermination. In March, 1929, he died. January 27, 1931, the board made an order of redetermination in the amount proposed by the commissioner, with interest from December 6, 1924. The order was not reviewed. February 14, 1931, the commissioner made a jeopardy assessment against the deceased in the amount fixed by the board as his liability as transferee.

His will was admitted to probate; a trust company it named was appointed executor; and, the executor having been dismissed, one Robinson was, on September 15, 1930, appointed administrator. Before settlement of the estate, plaintiff, April 24, 1931, filed its claim with the administrator. But he paid nothing on account of it and, making distribution in accordance with the will, transferred to defendant Henry Duggan $50,000 and to defendant trustee the rest of the estate, about $1,500,000. Plaintiff alleged that the assets so distributed had become impressed with a trust for the payment of its claim against testator and prayed decree enforcing it against trustee and beneficiaries under the will to the extent of assets transferred by the taxpayer to testator with interest.

Defendants, June 6, 1933, moved to dismiss the complaint on the ground that the suit was barred by §§ 277, 278, 280, Revenue Act, 1926, as amended, and § 311(b), Revenue Act, 1928. Plaintiff, January 11, 1937, confessed defendants' motion to dismiss. Then, applying for leave to amend the complaint, it represented to the court that amendment was necessary because the allegation that an assessment was made against testator was omitted from the original bill and was an important fact in determining whether the present action was timely brought. Leave having been granted, it immediately amended by adding the allegation that, February 14, 1931, the commissioner made against testator the jeopardy assessment above referred to. The complaint was not otherwise changed. March 22, 1937, the court sustained defendants' motion and entered decree dismissing the amended bill of complaint. The circuit court of appeals affirmed. 94 F. 2d 81. This Court granted a writ of certiorari. 304 U. S. 554.

The question is whether the suit is barred by the statutory provisions on which the motion to dismiss was based. First to be considered are §§ 277, 278 and 280, read in connection with applicable provisions of §§ 274 and 279 of the Revenue Act of 1926.[1]

[1] 44 Stat. 55 *et seq.*

The pertinent substance of these follows:

Within 60 days after notice of the commissioner's determination of deficiency, the taxpayer may file petition with the board of tax appeals for redetermination; no assessment or proceeding in court for collection shall be made or begun until the board's decision has become final. § 274(a).[2] The amount redetermined by decision that has become final shall be assessed and upon his demand shall be paid to the collector. § 274(b).

Assessment shall be made within five years after the return; "no proceedings in court without assessment for the collection of taxes shall be begun after the expiration of that period." § 277(a). The running of the statute of limitations on assessment or proceeding in court for collection of deficiency shall be suspended for the period during which the commissioner is prohibited from making assessment or bringing suit and for 60 days thereafter. § 277(b). Where the assessment has been made within the period properly applicable thereto, the tax may be collected by distraint or proceeding in court "but only if begun . . . within six years after assessment of the tax." § 278(d). If the commissioner believes that assessment or collection of deficiency will be jeopardized by delay he shall immediately assess the deficiency and "notice and demand shall be made by the collector for the payment thereof." § 279(a). Jeopardy assessment may be made whether or not the taxpayer has filed petition with the board. § 279(c). If it is made after the board's decision it may be only for the deficiency determined by the decision. § 279(d). The taxpayer may obtain stay of collection of the jeopardy assessment. § 279(f)-(h).

The liability at law or in equity of "a transferee of property of a taxpayer in respect of the tax" shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in case of a deficiency in a tax. § 280(a). Transferee liability must be assessed within one year from expiration of the period of limitation for assessment against the taxpayer. § 280(b)(1). The running of the period of limitation on transferee liability shall, after notice to transferee under § 274(a), be suspended for the period during which the commissioner is prohibited from making assessment of that liability and for 60 days thereafter. § 280(d).

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[2] The board's decision becomes final upon expiration of the time (six months after it renders decision) allowed for filing petition for review by a circuit court of appeals or the court of appeals of the District of Columbia. §§ 1001, 1005.

This is not a suit upon assessment of deficiency against the tax payer on account of the commissioner's determination as shown i his letter of December 6, 1924. The time for such a suit, six year after assessment, expired long before the commencement of thi suit. § 278(d). *United States v. Updike*, 281 U. S. 489, 494.

Nor is it a suit authorized to be brought, in absence of assess ment, to enforce liability of a transferee of the taxpayer's property The time for bringing such a suit is six years, made up of fiv years after return allowed for assessment against taxpayer § 277(a), and one year thereafter for assessment against trans feree. § 280(b)(1). The taxpayer having made its return on Ma 16, 1921, the six years expired May 16, 1927.

This suit is against transferees under the will of a transferee o the property of the taxpayer; it is based on the jeopardy assess ment made against testator.

Plaintiff asserts that it had six years after that assessment, o until Februry 14, 1937, within which to bring this suit. Its reason ing is that § 280, specifying no period of limitation for collection o liability of a transferee after it has been assessed, and providin that it shall be collected subject to the same limitations as in th case of deficiency in a tax, makes applicable the period of limitatio upon collection defined in § 278(d).

But no assessment was made against any of the defendants. Non of them is a transferee of the property of the taxpayer; all ar testamentary transferees of the estate of testator. It is clear tha §§ 278(d) and 280 upon which plaintiff relies are not broad enoug to impose on defendants any liability on account of the assessmen against the testator.[3] And, as already shown, suit on assessmen

[3] Cf. § 311, Revenue Act of 1928. It provides:

(a) "The amounts of the following liabilities shall, except as hereinafte in this section provided, be assessed, collected, and paid in the same manne and subject to the same provisions and limitations as in the case of a deficienc in a tax imposed by this title. . . . (1) The liability, at law or in equity of a transferee of property of a taxpayer, in respect of the tax . . . im posed upon the taxpayer by this title. . . .

(b) The period of limitation for assessment of any such liability of a trans feree . . . shall be as follows: (1) In the case of the liability of a initial transferee of the property of the taxpayer,—within one year after th expiration of the period of limitation for assessment against the taxpayer (2) In the case of the liability of a transferee of a transferee of the propert of the taxpayer,—within one year after the expiration of the period of limita tion for assessment against the preceding transferee, but only if within thre years after the expiration of the period of limitation for assessment agains the taxpayer;—
except that if before the expiration of the period of limitations for the assess ment of the liability of the transferee, a court proceeding for the collection o

against the taxpayer, or suit in absence of assessment of transferee liability, was by the applicable statutes of limitations barred long before this suit was brought.

Moreover, the assessment sued on was out of time. Plaintiff cites § 280(d) and seeks to apply to the facts of this case the rule that assessment against transferee is required to be made within 6 years after return, §§ 277(a), 280(b)(1), as follows: The taxpayer made its return May 16, 1921. When, on April 15, 1926, the commissioner notified testator that he proposed to assess transferee liability against him, there remained 13 months and a day of the period allowed for making that assessment; the commissioner was prohibited from making the proposed assessment for the 60-day period within which testator was permitted to petition for redetermination by the board and until its decision, January 27, 1931, became final, June 27, 1931, and for 60 days thereafter, September 25, 1931. §§ 278(d), 280(d). Taking in the 13 months and a day, plaintiff had until October 25, 1932 within which to assess testator. But that calculation is defective for it fails to take into account any part of the period after appeal to the board that elapsed between the death of petitioner in March, 1929, and the assessment, more than 23 months later, February 14, 1931. Redetermination is granted to safeguard against erroneous exactions by the commissioner. Suspension of his authority to assess or collect is protection against compulsory payment pending final decision upon objections interposed by petitioner. The proceeding is an adversary one in which the party praying relief by redetermination is petitioner and the commissioner is respondent. The controversy is brought to issue by petition, answer, and reply that are by the

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the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively,—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding."

The report of the Senate Committee on Finance states: "Section 280 of the revenue act of 1926 does not specifically provide any limitation period in the case of a transferee of a transferee of the taxpayer. Section 311(b)(2) of the House bill provides, with specific exceptions, that the period for assessment in such case shall be one year after the expiration of the period of limitation for assessment against the preceding transferee. It seemed to the committee that this would unduly prolong litigation and that there should be a time when the transferee may know that he is no longer liable to be proceeded against. A committee amendment therefore provides that in all cases the tax must be assessed within three years after the expiration of the period of limitation for assessment against the taxpayer." Senate Report No. 960, 70th Congress, 1st Session, p. 32.

board required to be definite and certain. Rules 6, 14, 15.[4] Before its decision either party, for cause shown, may have the proceeding dismissed.[5] Rule 31. And in case of petitioner's death, the board may order substitution of proper parties. Rule 37.

No personal representative of testator nor any other person applied for substitution of a party to carry on the proceeding in the place of the deceased testator, and none was ordered. The commissioner failed to obtain or seek dismissal for lack of a necessary party or want of prosecution. Cf. *Rusk* v. *Commissioner* (CCA 7) 53 F. 2d 428, 430. Plaintiff does not contend that, no substitution having been applied for or made, the commissioner was not entitled to an order of dismissal. Nor does it suggest anything to support the assumption, made in its calculation of time and throughout its argument, that suspension of commissioner's authority to assess continued through the period of more than 23 months between testator's death and the assessment. There is no ground on which it may be held that Congress intended in case of death of petitioner, where no application for or order of substitution is made, indefinitely to continue suspension of the commissioner's authority to assess. Equally unreasonable would it be to hold that suspension of the commissioner's authority to assess the asserted transferee liability continued after testator's death for more than a reasonable time within which, no substitution having been applied for or made, to obtain dismissal. Unquestionably that time and more had expired long before the assessment was made.

As the suit is barred by provisions of the Revenue Act of 1926, we need not consider § 311(b) of the Revenue Act of 1928, upon which defendants also relied.

*Judgment affirmed.*

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[4] Revised to November 1, 1929. Rules 31 and 37 are numbered 21 and 23 in the present edition of the Rules.

[5] Section 906(c), Revenue Act of 1926, provides: "If a petition for redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall . . . be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board cannot determine such amount from the pleadings." 44 Stat. 107.

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[January 3, 1939.]

Mr. Justice Stone.

I think the judgment should be reversed.

The first transferee was a "taxpayer" within the meaning of § 280(a)(1), since he was liable under the provisions of the revenue law to pay the tax and, like other taxpayers, was subject to assessment and distraint as well as to a suit for recovery of the tax. *United States* v. *Updike*, 281 U. S. 489, 494. Respondent, the second transferee, was therefore, in the words of § 280(a)(1), "a transferee of property of a taxpayer", and its tax liability was by that section to "be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in case of a deficiency in a tax imposed by this title . . . including the provisions . . . authorizing distraint and proceedings in court for collection . . . ."

Under § 278(d) the statute of limitations for collection of the tax from the first transferee did not expire until January, 1931, six years after assessment of the tax against the original taxpayer and first transferor. *United States* v. *Updike, supra.* By § 277(b) the running of the six year statute is suspended, after the beginning of deficiency proceedings under § 274(a), "for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court". And by § 274(a) it is provided that during the pendency of deficiency proceedings "no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted . . . ." It follows that the run-

ning of the statute of limitations in favor of the first transferee was suspended during the pendency of the deficiency proceedings initiated with respect to him April 15, 1926, at least, as the opinion of the Court states, until the death of the first transferee in March, 1929, or for a period of nearly three years. The period of limitations for the collection of the tax from the first transferee was thus extended at least until 1933, within which time the present suit was brought against respondent. By virtue of the transfer, the transferee, to the extent of the property received, becomes subject to the tax liability of the transferor. *Phillips* v. *Commissioner*, 283 U. S. 589, 592, 593, and cases cited in footnote 1. Since the period of limitations and the provisions for its suspension under §§ 274(a) and 277(b), applicable to the first transferee and taxpayer, are by § 280(a)(1) likewise applicable to his transferee, who is also a taxpayer, *United States* v. *Updike, supra,* 494, it follows that the statute of limitations applicable to respondent, the second transferee, had not expired when the present suit was brought in May, 1932.

No distinction was made by the revenue laws between the liability and the period of limitations applicable to a first transferee and those applicable to a second until the enactment of § 311 of the Revenue Act of 1928, which provided in subsection (b) (2) that the liability of a second transferee of the property of the taxpayer should not extend beyond three years after the expiration of the period of limitation for assessment against the original taxpayer, except that provision was made for an extension of the time if within that period "a court proceeding for collection of the tax or liability" had been begun against the original taxpayer or the last preceding transferee. In recommending these changes the report of the Senate Finance Committee, No. 960, 70th Congress, 1st Sess., p. 32, prepared before our decision in the *Updike* case, pointed out that § 280 of the 1926 Act did not specifically provide any limitation period in the case of a transferee of a transferee, and it stated that the purpose of the new provisions in § 311(b)(2) was to shorten the period during which proceedings might be had against a second transferee. This legislative history is persuasive that under § 280 of the 1926 Act, as its language indicates, the second transferee is the transferee of a taxpayer and subject to the same period of limitations and provisions for its extension as is his transferor.

As a transferee is subject to the tax liability of his transferor, the second transferee under the 1926 Act is either subject to the same period of limitations as his transferor, or there is no statute of limitations applicable to him. But if the first transferee is a taxpayer, so as to avail himself of the benefit of the six year statute of limitations for collection of the tax, as held in the *Updike* case, his transferee is likewise a taxpayer, as well as the transferee of a taxpayer, so as to be subject to the burden of the provisions extending the period of limitation for collection of the tax. §280(a)(1).

Mr. Justice BLACK concurs.